Google Inc. et al v. Egger et al
Doc. 441 Att. 11

# **Exhibit 12**

Dockets.Justia.com

95TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 95–1283, Pt. I

# FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

JUNE 8, 1978.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence, submitted the following

# REPORT

together with

## SUPPLEMENTAL, ADDITIONAL, AND DISSENTING VIEWS

[To accompany H.R. 7308 which on November 4, 1977, was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 7308) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

### AMENDMENTS

Strike all after the enacting clause and insert in lieu thereof:

That this act may be cited as the "Foreign Intelligence Surveillance Act of 1978".

TABLE OF CONTENTS

TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

Sec. 101. Definitions.
Sec. 102. Authorization for electronic surveillance for foreign intelligence purposes.
Sec. 103. Special courts.
Sec. 104. Application for an order.
Sec. 105. Issuance of an order.
Sec. 106. Use of information.
Sec. 107. Report of electronic surveillance.
Sec. 108. Congressional oversight.
Sec. 109. Penalties.
Sec. 110. Civil liability.

TITLE II—CONFORMING AMENDMENTS

Sec. 201. Amendments to chapter 119 of title 18, United States Code.

TITLE III—EFFECTIVE DATE

Sec. 301. Effective date.

29–228

lance of a U.S. person and to determine that the certification is not clearly erroneous.[20]

The court could approve electronic surveillance for foreign intelligence purposes for a period of 90 days or, in the case of surveillance of a foreign government, faction, or entity openly controlled by a foreign government, for a period of up to 1 year. Any extension of the surveillance beyond that period would require a reapplication to the court and new findings as required for the original order.

H.R. 7308 requires annual reports to the Administrative Office of the U.S. Courts and to the Congress of statistics regarding applications and orders for electronic surveillance. The Attorney General is also required, on a semiannual basis, to inform the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence fully concerning all electronic surveillance under the bill; and nothing in the bill restricts the authority of those committees to obtain further information related to their congressional oversight responsibilities.

## IV. CONCLUSION

The purpose of the Foreign Intelligence Surveillance Act is to provide legislative authorization for and regulation of all electronic surveillance conducted within the United States for foreign intelligence purposes. In so doing, the bill does not recognize, ratify, or deny the existence of any Presidential power to authorize warrantless surveillances in the United States in the absence of the legislation. It would, rather, moot the debate over the existence or non-existence of this power, because no matter whether the President has this power, few have suggested that his power would be exclusive. Rather, as two Attorneys General have testified, Congress also has power in the foreign intelligence area. Given the fact that Congress created the Central Intelligence Agency, delimiting its authorized functions and jurisdiction, and appropriates funds for the entire intelligence community, there can be little debate as to the fact that Congress has at least concurrent authority to enable it to legislate with regard to the foreign intelligence activities of departments and agencies of this Government either created or funded by Congress. Thus, even if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted. This analysis has been supported by two successive Attorneys General and draws directly from Justice Jackson's famous concurring opinion in the *Steel Seizure Cases*.[20a]

A basic premise behind this bill is the presumption that whenever an electronic surveillance for foreign intelligence purposes may in-

[20] The committee bill contains no general requirement of subsequent notice to the surveillance target, as does section 2518(8)(d) of title 18 for law enforcement surveillances. Such notice is particularly inappropriate in the area of foreign intelligence surveillances, where prosecution is rarely the objective or result. The mere knowledge of the existence or target of a foreign intelligence surveillance would most likely alert foreign governments and espionage services to ongoing U.S. intelligence activities or investigations and compromise sensitive intelligence sources and methods.

[20a] *Youngstown Sheet & Tube* v. *Sawyer,* 343 U.S. 579 (1952).

volve the fourth amendment rights of any U.S. person, approval for such a surveillance should come from a neutral and impartial magistrate. This premise has not been adopted without debate and consideration within the committee, as the Minority views will attest.

In approaching this issue, one must begin with the Constitution. What does it mandate? As noted above, this is a question about which reasonable men can certainly differ. While the weight of the case law suggests that a judicial warrant may not be required in certain cases, a plurality of the District of Columbia Circuit has suggested that a warrant is required by the fourth amendment in all cases. Because the Supreme Court has not addressed the issue, and indeed has taken pains not to address the issue, the question must be considered unresolved.

Beyond the constitutional question, there is also a question of proper policy. The minority views reflect the belief that the judiciary should not be involved in foreign intelligence surveillances. With all due respect to those views, the committee's conclusion, shared by the last two administrations involving both political parties, is that a warrant requirement for electronic surveillance for foreign intelligence purposes will not pose unacceptable risks to national security interests and will remove any doubt as to the lawfulness of such surveillance. By requiring a judge ultimately to approve foreign intelligence electronic surveillances, the bill would require the responsible officials in the executive branch to consider and articulate the facts and their appraisal of the facts. If the executive officials were the approving authority, the same consideration and articulation would not be as likely to occur. The experience under title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., section 2510 et seq., is instructive. While few orders for law enforcement electronic surveillances have been denied, the committee believes that the reason is the care and scrutiny which applications receive before they ever go to a judge. The institutional response to an outside approval authority, then, is to make every effort that only good applications should go to the approval authority.

Moreover, there is no validity to the assertion that judges will somehow become involved under the bill in making foreign policy of foreign intelligence policy. The bill was carefully crafted to prevent such an eventuality. The role of judges under the bill is the same as that of judges under existing law enforcement warrant procedures. That is, judges determine whether the facts presented to them satisfy the statutory criteria. They do not make substantive judgments as to the propriety of or need for a particular surveillance; rather, Congress by enacting this bill establishes the substantive standards as to what the proper target of a surveillance is, what information sought justifies a surveillance, and what standards apply to the retention and dissemination of information obtained. Judges, of course, assess the facts to determine whether certain of the substantive standards have been met, but this is the traditional role of a judge in passing on a warrant application. And while certain of the determinations made by judges under this bill are unique to this area, the same could have been said with respect to title III when it was introduced. Indeed, as searches differ in technique and purpose, differing determinations necessarily such persons do not have standing to file a motion under section 106 or under any other provision. The minimization procedures do apply to such persons and, to the extent that such persons lack standing, the committee recognizes that it has created a right without a remedy. However, it is felt that the Attorney General's regulations concerning the minimization procedures, judicial review of such procedures, and criminal penalties for intentional violation of them, will provide sufficient protection.

Section (f) sets out special judicial procedures to be followed when the Government concedes that it intends to use or has used evidence obtained or derived from electronic surveillance. Where, in any trial or proceeding, the Government concedes, either pursuant to the notification[46] requirements of subsection (c) and (d) or after a motion is filed by the defendant pursuant to subsection (e), that it intends to use or has used evidence obtained or derived from electronic surveillance, it may make a motion before the special court to determine the lawfulness of the surveillance. The special court must then determine whether the surveillance was lawful or not. In so doing, no judge who granted an order or extension involving the surveillance at issue could make the determination, unless all the judges of the special court would be so disqualified.

The determination would be made in camera if the Attorney General certifies under oath that disclosure would harm the national security or compromise foreign intelligence sources and methods.[47] However, when the special court determines that there is a reasonable question as to the legality of the surveillance and disclosure would likely promote a more accurate determination thereof (or when the court determines that disclosure would not harm the national security) the defendant should be provided relevant portions of the application, order, or other materials. Whenever there is a reasonable question of legality, it is hoped that disclosure, with an in camera adversary hearing, will be the usual practice. The committee considered requiring an adversary hearing in all cases, but was persuaded by the Department of Justice that in those instances where there is no reasonable question as to the legality of the surveillance security considerations should prevail. In ordering disclosure, the special court must provide for appropriate security procedures and protective orders.

Subsection (f), outlined above, deals with those rare situations in which the Government states it will use evidence obtained or derived from an electronic surveillance.

Subsection (g) states in detail the procedures to be followed when, in any court or other authority of the United States or a state, a motion or request is made to discover or obtain applications or orders, or other materials relating to surveillance under this title, or to discover, obtain or suppress any information obtained from electronic surveillance, and the Government certifies that no information obtained or derived from an electronic surveillance has been or is about to be used by the Government before that court or other authority.

When such a motion or request is made, it will be heard by the Special Court of Appeals if:

> The court or other authority in which the motion is filed determines that the moving party is an aggrieved person, as defined;
>
> The Attorney General certifies to the Special Court of Appeals that an adversary hearing would harm the national security or compromise intelligence sources or methods; and;
>
> The Attorney General certifies to the Special Court of Appeals that no information obtained or derived from an electronic surveillance has been or is to be used.

If the above findings and certifications are made, the special court of appeals will stay the proceedings before the court or other authority and conduct an ex parte, in camera inspection of the application, order or other relevant material to determine whether the surveillance was lawfully authorized and conducted.

The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to afford due process to the aggrieved person.

It is to be emphasized that, although a number of different procedures might be used to attack the legality of the surveillance, it is the procedures set out in subsections (f) and (g) "notwithstanding any other law" that must be used to resolve the question. The committee wishes to make very clear that these procedures apply whatever the underlying rule or statute referred to in the motion. This is necessary to prevent these carefully drawn procedures from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

Subsections (f) and (g) effect substantial changes from H.R. 7308, as introduced. The committee has adopted a suggestion of the General Counsel of the Administrative Office of the U.S. Courts in providing that judicial determinations with respect to challenges to the legality of foreign intelligence surveillances and motions for discovery concerning such surveillances, where the Government believes that adversary hearings or disclosure would harm the national security, will be made by the special court or the special court of appeals. Given the sensitive nature of the information involved and the fact any judge might otherwise be involved in situations where there would be no mandated security procedures, the committee feels it appropriate for such matters to be considered solely by the special courts.

Moreover, judges of the special courts are likely to be able to put claims of national security in a better perspective and to have greater confidence in interpreting this bill than judges who do not have occasion to deal with the surveillances under this bill, and the Government is likely to be less fearful of disclosing information even to the judge where is knows there are special security procedures and the judge already is cognizant of other foreign intelligence surveillances. These

---

[46] It should be emphasized that notification by the Government triggers the special court procedures whether or not the defense has filed a suppression or discovery motion. Thus, if, before the filing of such motions, the Government concedes use of evidence obtained from electronic surveillance, and the Court determines that the surveillance was lawful, a discovery or suppression motion would be moot because of the requirements of subsection (h).

[47] In many, if not most cases, the Attorney General's affidavit will have to be based on information supplied to him by other Executive officers. It is perfectly proper for the Attorney General in making his affidavit to rely on conclusions and beliefs held by others in the Executive Branch who are responsible for national security or intelligence sources and methods.